No. 05-746

FILED
JUL 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Writ of Certiorari to the Missouri Court of Appeals

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 7, 2005
CERTIORARI GRANTED MAY 15, 2006

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 05-746 Petition For A Writ Of Certiorari.

Sorrell v. *Norfolk S. Ry.*, 170 S.W.3d 35 (Mo. Ct. App. 2005) 1a-2a

Sorrell v. *Norfolk S. Ry.*, No. ED84268 (Mo. Ct. App. July 5, 2005) (memorandum supplementing order) 3a-21a

Completed Verdict Form B, *Sorrell* v. *Norfolk S. Ry.*, Cause No. 012-8583 (E.D. Ct. App. St. Louis Nov. 7, 2003) 26a

EASTERN DISTRICT COURT OF APPEALS
CITY OF ST. LOUIS

Cause No. 012-08583

TIMOTHY SORRELL,

Plaintiff,

v.

NORFOLK SOUTHERN RAILROAD COMPANY,

Defendant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
7/02/01	Summons to ST LOUIS COUNTY issued for D001–NORFOLK SOUTHERN RAILWAY COMPANY.
	* * * *
11/03/03	Cause called, Plaintiff appears in person and by Attorney Paul Slocomb. Defendant appears in person and by Attorney David Dick. The court orders the court reporter to take notes to preserve the evidence. Panel of thirty (32) jurors called. Instructions partially read to panel. Jury Panel sworn, Instructions completed. Examination of jury panel on voir dire begun and not concluded. Jury admonished. Court is in luncheon recess. Examination of jury panel on voir dire continues and not concluded. Recess called. Jury admonished. Examination of jury panel on voir dire continued and is concluded. Recess called. Jury of twelve and two alternates selected but not

DATE	PROCEEDINGS
	sworn. Jury admonished. Court is adjourned until November 4, 2003 at 9 o'clock a.m.. SO ORDERED: Judge Joan M. Burger–24764. Joanne Martin is the court reporter.
11/04/03	Cause again called, parties and jury again appear. Jury trial resumes. Jury of twelve and two alternates sworn. Instructions read. Opening statements made by counsel for plaintiff and defendant. Evidence of plaintiff's witnesses begun and not concluded. Jury admonished. Court is in luncheon recess. Evidence of plaintiff's witnesses continues and not concluded. Recess called. Jury admonished. Evidence of plaintiff's witnesses continues and not concluded. Recess called. Jury admonished. Court is adjourned until November 5, 2003 at 9 o'clock a.m. SO ORDERED: Judge Joan M. Burger. Joanne Martin is the court reporter.
11/05/03	Cause again called, parties and jury again appear. Jury trial resumes. Evidence of plaintiff's witnesses continues and not concluded. Recess called. Jury admonished. Evidence of plaintiff's witnesses continues and not concluded. Jury admonished. Court is in luncheon recess. Evidence of plaintiff's witnesses continues and not concluded. Recess called. Jury admonished. Evidence of plaintiff's witnesses continues and is concluded. Plaintiff rests. Recess called. Jury admonished. Court is adjourned until November 6, 2003 at 9 o'clock a.m. SO ORDERED: Judge Joan M. Burger–24764. Joanne Martin is the court reporter.

DATE	PROCEEDINGS
11/06/03	D001–NORFOLK SOUTHERN RAILWAY COMPANY objections to the use of MAI 8.02 and MAI 36.01 as violating the United States Constitution filed.
11/06/03	Cause again called, parties and jury again appear. Jury trial resumes. Plaintiff reopens case. Evidence of plaintiff's witnesses continues and is concluded. Plaintiff rests. At the close of plaintiff's case oral motion for directed verdict is heard and denied. Evidence of defendant's witnesses begun and not concluded. Recess called. Jury admonished. Evidence of defendant's witnesses continues and is concluded. Defense rests. At the close of the entire case oral motion for directed verdict heard and denied. Rebuttal evidence begun and is concluded. Jury admonished. Court is in luncheon recess. Instructions read. Arguments made by counsels for plaintiff and defendant. Sheriff sworn. Jury retires to deliberate at 2:48 p.m.. At 4 o'clock p.m. recess called. Overnight instructions read. Jury admonished. Court is adjourned until November 7, 2003 at 9 o'clock a.m.. SO ORDERED: Judge Joan M. Burger–24764. Joanne Martin is the court reporter.
11/07/03	Cause again called, parties and jury again appear. Jury trial resumes. Jury returns at 9:30 a.m. from evening recess and continues deliberation. At 9:45 a.m. question from the jury received and answered by the court. At 10:30 a.m. jury returnes a verdict as follows: VERDICT-A- Whereas on the claim of Timothy Sorrell for 10-29-99 injury against Norfolk Southern Railway Co. the jury

DATE	PROCEEDINGS
	found in favor of plaintiff. The jury found the total damages of plaintiff to be 0. VERDICT-B-Where as on the claim of plaintiff for the 11-1-99 injury against defendant the jury found in favor of plaintiff. The jury found the total damages of plaintiff to be $1,500,000.00. Wherefore it is hereby ordered and adjudged that plaintiff have and recover of defendant 1,500,000,00. Cost of this action to be taxed against defendant. Jury polled and discharged. Jury list, jury panel list, instructions, questions and sheriff's fees received and filed. SO ORDERED: Judge Joan M. Burger-24764. Joanne Martin is the court reporter.
	* * * *
12/05/03	D001–NORFOLK SOUTHERN RAILWAY COMPANY Motion for new trial filed.
	* * * *
12/19/03	Memorandum in opposition to TO defendant's motion for a new trial.
	* * * *
2/23/04	24764–JUDGE JOAN BURGER – D001–NORFOLK SOUTHERN RAILWAY COMPANY motion FOR NEW TRIAL IS DENIED PER COURT ORDER FILED.
	* * * *
3/11/04	Notice of Appeal sent to Missouri Court of Appeals by certified mail number 70023150000121554491. Copy of notice of appeal sent to Paul Slocomb, by certified mail number 70023150000121554477.
	* * * *

MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. ED84268

TIMOTHY SORRELL,
Respondent,

v.

NORFOLK SOUTHERN RAILROAD COMPANY,
Appellant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
03/04/2004	NOA Filed in Circuit Court
	* * * *
03/15/2004	NOA Filed in Appellate Court
	* * * *
10/18/2004	Appellant's Brief, Filing Party: DICK, DAVID ALLEN
	* * * *
12/10/004	Respondent's Brief, Filing Party: SCHLICHTER, JEROME J
	* * * *
01/11/2005	Appellant's Reply Brief, Filing Party: ERWIN, JAMES W
02/08/2005	Case Submitted, Associated Events: 02/08/2005—Oral Argument

DATE	PROCEEDINGS
07/05/2005	Opinion-Affirmed
	Per Curiam Order Opinion
07/20/2005	Mot for Rehearing/Tran to SC, Filing Party: ERWIN, JAMES W
	* * * *
08/22/2005	Denied
	* * * *
09/02/2005	Appl for Tran SC Filed in SC, Filing Party: DICK, DAVID ALLEN
	* * * *
09/20/2005	Denied
	* * * *

SUPREME COURT OF MISSOURI

No. SC87089

TIMOTHY SORRELL,

Respondent,

v.

NORFOLK SOUTHERN RAILROAD COMPANY,

Appellant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
09/06/2005	Appl for Tran SC Filed in SC, Filing Party: DICK, DAVID ALLEN, Associated Filing Parties: NORFOLK SOUTHERN RAILWAY COMPANY
	* * * *
09/20/2005	Disp-App Tran to SC Denied, MANDATE SENT TO CLERK, MISSOURI COURT OF APPEALS; COPIES SENT TO COUNSEL OF RECORD

IN THE EASTERN DISTRICT COURT OF APPEALS
CITY OF ST. LOUIS

Cause No. 012-8583

TIM SORRELL,
Plaintiff-Respondent,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant-Appellant.

Before the Honorable Joan M. Burger

TRANSCRIPT ON APPEAL
November 3-7, 2003

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* * * *

[631] THE COURT: Do you have, do you have any objections to the instructions? At the instruction conference the Court forgot to ask if there were any objections.

I asked for additional instructions and I received those from the defendant. I did not ask [632] for objections.

Are there objections to the instructions the court intends to give?

MR. DICK: Yes, Judge. I have just a couple.

It's noted in our motion for directed verdict, but in an abundance of caution we would renew the motion for directed verdict at the close of the evidence that we filed at the close of the defendant's case.

THE COURT: Yes. Your motion, including now the five minutes of rebuttal, is overruled.

MR. DICK: No change in that.

MR. SLOCOMB: I move for a directed verdict on the issue of mitigation of damages.

I don't believe the defendant has made a submissible case under FELA for mitigation of damages on either court.

THE COURT: Your motion is denied.

MR. DICK: Judge, as far as any objection to the jury instructions, my only objection is as to Instruction 8.

My objection is not to the form of it, but as stated in the motion for directed verdict—oh, it's not 8. I'm talking about another one.

I apologize. My objection is to [633] Instruction 12 as stated in the motion for directed verdict.

Judge, we believe there is no connection between any failure of Norfolk Southern to provide Mr. Sorrell with a reasonably safe place to work or as far as causing his injuries.

If his injuries were caused by any negligence, caused by the negligent driving of Keith Woodin, I agree plaintiff has made a submissible case and Mr. Woodin is negligent.

With whether Norfolk Southern failed to provide a reasonably safe place to work, we believe there is no sufficient causal connection.

THE COURT: Your objection is overruled.

MR. DICK: And, Judge, Instruction 13, contributory fault.

As we discussed earlier, we did have the objection about the words directly contributed to cause versus resulted in whole or in part from as a result of plaintiff's verdict director.

THE COURT: That's overruled.

MR. DICK: I wanted to note that objection for the record. I think I stated it earlier. I don't think I specifically referred to Instruction 13 when I did that.

[634] THE COURT: That's overruled.

MR. DICK: Because the language of the verdict director in paragraph third of Instruction 13 does not, is inconsistent with the law 45 U.S. Code Section 51 and Section 53.

And then we have an objection to Instruction 14, the damage instruction. And the objection also goes to verdict form B.

And our objection is as we previously discussed on the record before and it is stated in the written memorandum.

THE COURT: You can just refer to your lengthy objection that is filed with the Court, file-stamped today, and contains all your objections under the Constitutional provisions, correct?

MR. DICK: Correct. And we tendered Instructions B and C and we understand those are overruled.

* * * *

INSTRUCTION NO. A

[Filed Nov. 7, 2003]

You must find plaintiff contributorily negligent on his November 1, 1999 injury claim if you believe:

First, plaintiff either:

failed to stop his truck, or

failed to keep his truck on the roadway, and

Second, plaintiff, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence of plaintiff contributed in whole or in part to cause his injury.

INSTRUCTION REFUSED

/s/ Joan M. Burger
JOAN M. BURGER
Circuit Judge
11/6/03

Defendant's Instruction No. A

Modified MAI 32.07(B), paragraph Third modified in light of language of 45 U.S.C. sections 51 and 53 and FELA pure comparative fault system.

LIST OF INSTRUCTIONS

1. 2.01
2. 2.03
3. 2.02
4. 3.01
5. 11.07
6. 2.04

Package 1

7. 2.05
8. 24.01
9. 8.02
10. 32.07 (A)

Verdict Form A 36.01

Package 2

11. 2.05
12. 24.01
13. 32.07 (B)
14. 8.02
15. 32.07 (A)

Verdict Form B

INSTRUCTION NO. 11

Instructions 11 through 15 and the general instructions 1 through 6 apply to the claim of plaintiff Timothy Sorrell's personal injury on or about November 1, 1999. Use Verdict B to return your verdict on this claim.

Plaintiff's Instruction No. ___
M.A.I. 2.05 [1980 Revision]

INSTRUCTION NO. 12

Your verdict must be for plaintiff Timothy Sorrell if you believe:

First, that on November 1, 1999, defendant Norfolk Southern Railway Company's employee failed to use ordinary care or defendant Norfolk Southern Railway Company failed to provide Plaintiff with reasonably safe methods for work, and

Second, defendant in any one or more of the respects submitted in paragraph First was negligent, and

Third, such negligence resulted in whole or in part in injury to plaintiff.

Plaintiff's Instruction No. ____
M.A.I. 24.01 [1992 Revision]

INSTRUCTION NO. 13

You must find plaintiff contributorily negligent on his November 1, 1999 injury claim if you believe:

First, plaintiff either:

failed to stop his truck, or

failed to keep his truck on the roadway, and

Second, plaintiff, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence of plaintiff directly contributed to cause his injury.

Defendant's Instruction No. ____
MAI 32.07(B)

INSTRUCTION NO. 14

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future as a result of the occurrence mentioned in the evidence. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income tax. If you find that plaintiff failed to mitigate damages as submitted in Instruction Number 15, in determining plaintiff's total damages you must not include those damages which would not have occurred without such failure. If you find plaintiff contributorily negligent as submitted in Instruction Number 13, then your award must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff.

Plaintiff's Instruction No. ___
M.A.I. 8.02 [1996 Revision]

INSTRUCTION NO. 15

If you find in favor of plaintiff on his November 1, 1999 injury claim, you must find that plaintiff failed to mitigate damages if you believe:

First, plaintiff either:

failed to obtain employment, or

failed to take steps to obtain employment, and

Second, plaintiff thereby failed to use ordinary care, and

Third, plaintiff thereby sustained damage which would not have occurred otherwise.

Defendant's Instruction No. ___
M.A.I. 32.07(A)

VERDICT B

Note: Complete this form by writing in the name required by your verdict.

On the November 1, 1999 claim of plaintiff Timothy Sorrell for personal injuries against defendant Norfolk Southern Railway Company, we, the undersigned jurors, find in favor of:

_____ _____

(Plaintiff Timothy Sorrell) or (Defendant Norfolk Southern Railway Company)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Timothy Sorrell.

We, the undersigned jurors, assess the damages of plaintiff Timothy Sorrell at $_____.

Note: All jurors who agree to the above findings must sign below.

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

Plaintiff's Instruction No. ___
M.A.I. 36.01 [1980 Revision]

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

[Filed DEC 5, 2003]

Cause No: 012-08583
Division No. 13

TIMOTHY SORRELL,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

DEFENDANT'S MOTION FOR NEW TRIAL

COMES NOW Defendant Norfolk Southern Railway Company, pursuant to Missouri Rule of Civil Procedure 78.01, requests the Court grant a new trial with respect to Plaintiff's Count I claim arising out of his November 1, 1999 incident, on one or more of the following grounds:

1. The jury decided two separate claims filed pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* On November 7, 2003, the jury returned a verdict in favor of Plaintiff on his claim arising out of the October 20, 2003 incident, but awarded $0 damages, and returned a verdict of $1.5 million on Plaintiff's claim arising out of the November 1, 1999 incident. Much of Plaintiff's evidence and much of his economic loss claim focused upon the replacement costs of health insurance for him and for his wife. Plaintiff's wife suffers from progressive multiple sclerosis, a fact presented to the jury. Plaintiff was allowed to present evidence and argue to the jury that Plaintiff Sorrell *and* his wife would be required to pay around $360,000, not including future cost increases, for health insurance until Mr. Sorrell

reaches the age of 65. The jury heard evidence of separate calculations for future insurance costs for both Plaintiff *and* his wife, $165,389 for Plaintiff and $198,503 for his wife.

The Court Erred in Applying MAI 32.07(B), Which Misstates Federal Law

2. The Court erred in rejecting Defendant's Tendered Instruction A and giving Instruction 13, based upon MAI 32.07(B). Paragraph Three of MAI 32.07(B) misstates the applicable causation standard under the FELA. Taken together, MAI 32.07(B) (as submitted in Instruction 13) and MAI 24.01 (as submitted in Instruction 12) misstate the standards of causation applicable under the FELA and improperly impose upon the defendant a higher burden of proving causation. The approved version of MAI 32.07(B) states a causation standard of "directly contributed to cause;" the approved version of MAI 24.01 states a causation standard of "contributed in whole or in part." The FELA imposes a pure comparative fault system, with the same standard of causation governing both the defendant's and the plaintiffs fault. *See* 45 U.S.C. § 51 and 53; *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1282-83 (3d Cir. 1995); *Gavagan v. United States*, 955 F.2d 1016, 1019 n.7 (5th Cir. 1992) ("[T]he same general negligence . . . and causation standards apply to both employer and employee in Federal Employers' Liability Act . . . cases."). Thus, Instruction 13 and MAI 32.07(B) misstate the law by imposing a much higher standard of causation ("directly contributed") upon the defendant than the standard imposed upon the plaintiff in Instruction 12 and MAI 24.01 ("contributed in whole or in part").

* * * *